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IN THE

Supreme Court

OF THE

United States

October Term, ~~1948~~ 1949

No. ~~721~~ 49

HELEN PARKER, et al.,
Petitioners,

vs.

COUNTY OF LOS ANGELES, et al.,
Respondents.

No. ~~722~~ 50

JULIA LEARNED STEINER,
Petitioner,

vs.

COUNTY OF LOS ANGELES, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 711

HELEN PARKER, et al.,
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Respondents.

No. 712

JULIA LEARNED STEINER,
Petitioner,

vs.

COUNTY OF LOS ANGELES, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

The joint petitions for certiorari herein seek review of a judgment of the District Court of Appeal of the State of California. The judgment became final

with the denial of hearing by the State Supreme Court on January 10, 1949 (P. 76, S. 49).* The opinion by the District Court of Appeal sets forth with particularity the facts on page 489 of 88 A. C. A. (P. 47-63, S. 47):

"CONCEDED FACTS

"On August 26, 1947, the Board of Supervisors of the County of Los Angeles adopted a resolution requiring each officer and employee under its jurisdiction to execute an oath and affidavit reading as follows:

"'OATH AND AFFIDAVIT

"'DEPARTMENT _____

"'A. OATH OF OFFICE OR EMPLOYMENT

"'I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and laws of the State of California, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office or employment on which I am about to enter or am now engaged. SO HELP ME GOD.

"'B. AFFIDAVIT RE SUBVERSIVE ACTIVITY

*References to the Parker record will be thus: (P. 1) and to the Steiner record thus: (S. 1).

"'I do further swear (or affirm) that I do not advocate, nor am I now a member, nor have I been since December 7, 1941, a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles, by violence, except those specified as follows: _____ and that during such time as I am an officer or employee of the County of Los Angeles, I will not advocate nor become a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles, by force or violence.

"'C. AFFIDAVIT RE ALIASES

"'I do further swear (or affirm) that I have never used or been known by any names other than those listed as follows: _____.'

"Also included in the document is paragraph 'D' requiring such officers and employees to indicate whether they have been a member of or supported any of some 142 named organizations.

"September 3, 1947, plaintiffs, who are employees of the county of Los Angeles, filed complaints, seeking an injunction to prevent defendants from requiring them to execute an affidavit as set forth above.

"March 5, 1948, the Honorable Clarence M. Hanson, trial judge, sustained demurrers to plaintiffs' amended complaints without leave to amend, and on March 9, 1948, judgments of dismissal of the actions were entered. From these

judgments plaintiffs appeal. There are also purported appeals from the orders sustaining defendants' demurrers to plaintiffs' complaints as amended."

The opinion of the District Court of Appeal also sets forth the question involved in the litigation before the State court:

"Question

"*May the Board of Supervisors of the County of Los Angeles proceed with a fact-finding program under which the officers and employees within its jurisdiction are asked: (1) to take an oath of allegiance to the federal and state constitutions and the laws of California as against all enemies of the United States of America, the State of California, and the county of Los Angeles; and (2) as such officers and employees to answer upon their oath or affirmation, (a) whether or not they advocate the overthrow of the government by force or violence, and whether or not since December 7, 1941, they have been members of any organizations or political parties that advocate the overthrow of the government by force or violence, as well as to sign an affidavit not to advocate the overthrow of the government by force and violence or to become a member of an organization or political party which so advocates so long as the person is a county officer or employee; (b) to state any aliases they have ever used or been known by; and (c) to indicate whether they have ever been a member of or directly or indirectly supported any of the organizations listed in the affidavit submitted to them?*"

In addition to stating the question with particularity, the highest court of the state passing upon the litigation expressly declared that the question of discharge was not before the court:

> "'. . . Whether the appointing power will or will not discharge employees as claimed by the plaintiffs, for causes of the character enumerated, and whether the Civil Service Commission will uphold such discharges, if any, on such causes, are not matters upon which this Court may speculate or adjudicate at this time. . .'" (P. 63).

II.

PETITION FOR CERTIORARI PREDICATED ON BASIC ERROR

(a) *Petition is predicated on erroneous facts.*

The basic error of the petition for writs of certiorari is the assumption of imaginary facts followed by legal theories attempting to support the petition for hearing based upon the imaginary facts but in no way applicable to the facts at bar. These theories in no way dispose of the real issues which were before the state court.

It seems implausible that petitioners should obtain writs of certiorari by reciting facts which are not at bar, followed by a request that this court pass on legal theories allegedly applicable to such imaginary facts but not applicable to the real issues which were before the state court.

The real facts, of course, are as related in the decision of the District Court of Appeal,* as no petition for rehearing challenging the facts as set forth in the District Court of Appeal opinion was filed in said court.

Imaginary assertions give rise to false questions, and therefore in order to properly determine what constitutional questions are before this court a clear understanding of the actual facts must be envisaged.

An examination of the order of the Board of Supervisors and a reference to the questions alleged by the petitioners to be presented, quickly demonstrates the fallacy of relying on imaginary facts. Petitioners' statement as to what they presume to be the facts discloses:

> (1) "Under Paragraph 'D' of the compulsory Oath and Affidavit county employees are required to disclose . . . The scope of the disclosure thus required is revealed by an examination of the listed organizations and publications which include among others the following . . ." (Petition, pages, 4, 5).

*Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, Rule 29b: "*On petition for hearing, the Supreme Court will not examine the record for error, or inquire into the correctness of the facts stated in the opinion unless the petition shows (1) that material facts were omitted from or incorrectly stated in the opinion of the District Court of Appeal and that the alleged omission or other inaccuracy was set forth in a petition for rehearing and was not corrected by the District Court of Appeal;* or (2) that substantial legal issues raised in the brief were not considered in the opinion, and that the failure to consider them was set forth in a petition for rehearing." (Italics ours.)

Then follows a list *which is not* a copy of the organizations embraced within the Board order, or a copy of any allegation in the amended complaint in the state court, but a list interspersed with conclusions relating to the purpose of the organizations. An apparent defect is the listing of "Named Religious Organizations." There is no evidence to support the conclusion that any religious organization is listed in Paragraph "D" of the Oath and Affidavit.

Respondents unhesitatingly deny that any organization listed is a religious organization.

This conclusion unsupported by true facts is demonstrative of other conclusions and assumptions of purported facts by the petitioners which are not supported by the record. As, for example:

> (2) "Any county employee, including petitioners, who fails or refuses to execute the Oath and Affidavit *is to be discharged* from county employ." (Petition, page 6.) (Italics ours).

This conclusion is again the statement of a nonexistent fact. Actually the order of the Board of Supervisors contains no reference whatsoever to discharge or any other penalty. (P. 16, S. 15).

Further the state court determined (P. 63):

> "Whether the appointing power will or will not discharge employees as claimed by the plaintiffs, for causes of the character enumerated, and whether the Civil Service Commission will uphold

such discharges, if any, on such causes, are not matters upon which this Court may speculate or adjudiate at this time. . ."

Another imaginary fact stated in the Petition is:

(3) "Petitioners in their amended complaint sought injunctions prohibiting the respondent County and the several respondent officers thereof from requiring petitioners, *on pain of discharge*, to execute the Oath and Affidavit." (Petition, page 7.) (Italics ours.)

This statement, as a fact, is not within the purview of the order of the Board of Supervisors of the County of Los Angeles which was under attack in the state court. Neither the Board of Supervisors nor the Loyalty Check Committee can discharge petitioners. The state court made this clear in its construction of the order of the Board of Supervisors and the state statutes. In this respect the state court declared (P. 58):

"In case the appointing power wishes to discharge a civil service employee the reasons therefor must be given and, thereupon, if the employee so desires he is entitled to a hearing before the commission. If the commission finds that the reasons are not sufficient, the discharge is void, [fol. 415] despite anything the appointing power can do about it.

"From what has so far been said, it is self-evident that neither the Board nor its agents can

discharge a civil service employee for any cause that the Civil Service Commission finds insufficient. Accordingly, if in the view of the Board of Supervisors, or its agents as the appointing power, a civil service employee should be discharged on the sole ground that the employee is 'subversive,' the discharge or attempt to discharge on that ground is of no effect if, on hearing, the Commission holds otherwise."

Petitioners state further:

(4) "The committee is ordered and directed, if it decides *on the basis of any answer to the Oath and Affidavit* or as a result of any of the other parts of its ordered investigation, that any employee is 'subversively inclined,' *to publicly report* such individual . . ." (Petition page 6-7) (Italics ours)

This alleged statement of a fact is precisely contrary to the actual facts at bar. The order of the Board of Supervisors does not authorize the Loyalty Check Committee to *publicly* report. Futhermore under the order of the Board of Supervisors, the Loyalty Check Committee can only report if the employee is known to be subversive. (P. 18, S. 17) The Board of Supervisors' order specifies that membership in the listed organizations in and of itself is not evidence of subversiveness. (P. 17, S. 16):

". . . (W)e wish to make it clear that the mentioning of the name of an organization in these reports does not necessarily mean and is not

intended to convey the implication that they are subversive or Communistic or have ever been engaged in any subversive or Communistic activities."

There is no allegation in the amended complaint that the petitioners ever answered the Oath and Affidavit. Until such time as petitioners answer the Oath and Affidavit, the allegation of *publicly* reporting is purely a hypothetical assumption of what might happen in the event they did execute the Oath and Affidavit.

(b) *Petition raises false questions.*

That imaginary assertions give rise to false questions is clearly indicated by the statement of petitioners as to their conception of the questions presented. (Petition, page 8).

The first assumption is that of *compulsion* on behalf of the employees to execute the Oath and Affidavit. As it clearly appears that the issue of discharge or other penalty for failure to answer the Oath and Affidavit does not exist under the Board of Supervisors' order of August 26, 1947, there was, therefore, no compulsion to execute the Oath and Affidavit.

It is also assumed that the execution of paragraphs "B" and "D" of the Oath and Affidavit deprives the petitioners of the liberty of religion. It is an undeniable fact that the constitutional question of deprivation of the liberty of religion was not pleaded in the

complaint, was not raised by the petitioners in any of their briefs before the District Court of Appeal, nor was it raised by the petitioners in their petition for hearing before the Supreme Court of the State of California. The state court did not voluntarily pass upon the religious issue. (P. 47, S. 47).

(c) *Petition contains reasons predicated upon statements which are not true and are not the facts as evidenced in the record.*

The injection of imaginary facts into the petition for certiorari not only creates false questions but likewise creates false reasons upon which this court is asked to grant the writs of certiorari.

On page 9 of the Petition under the heading "Reasons for Granting the Writs", petitioners declare:

> " . . . The concept that one, even a public employee, must account to his superior . . . as to the manner in which he may choose to worship his God, is a concept utterly foreign to this country."

This alleged reason for granting a writ may be a perfectly good reason in some other law suit but certainly not this one. No religious organization is mentioned in the Oath and Affidavit and no contention that religious rights were abrogated was in any manner raised by the petitioners in the state court, nor was such an issue passed upon by the highest court of the state.

As a further reason for the granting of petition for certiorari, petitioners argue that the inclusion of Paragraphs "B" and "D" of the Oath and Affidavit "tends to coerce and intimidate petitioners in their free exercise of those liberties." (Petition, page 10). Obviously if the issue of discharge or other penalty does not exist under the terms of the Board order of August 26, 1947, there can be no coercion or intimidation and therefore any assertion of a tendency to coerce and intimidate as a reason for granting the petition for certiorari is an invalid and unwarranted reason.

III.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The petition for certiorari should be denied for the following reasons:

1. The Supreme Court of the United States will not review a constitutional question predicated upon imaginary facts not presented by the record.

2. The decision of the State court is supported by adequate and independant state grounds.

(a) Determination that no issue of discharge by the Board of Supervisors or the Loyalty Check Committee can exist in this litigation under the law in California.

(b) Determination that issue of discharge is premature.

(c) Determination that petitioners must first exhaust their administrative remedy by seeking review of the Civil Service Commission in the event that a discharge does occur.

3. The Supreme Court will avoid the unnecessary decision of constitutional questions.

4. The construction given by the highest state court to a statute of that state is conclusive upon the Supreme Court of the United States where the question involved is whether such statute is repugnant to the Federal Constitution.

5. The petition for certiorari presents no case or controversy cognizable in the Supreme Court of the United States.

(a) As construed by the District Court of Appeal of California, the Board of Supervisors' order of August 26, 1947, presents no case or controversy.

(b) Petitioners' amended complaint does not contain facts essential to state a case or controversy.

6. Particular reference to *Steiner v. County of Los Angeles*, No. 712.

1. The Supreme Court of the United States Will Not Review a Constitutional Question Predicated Upon Imaginary Facts Not Presented in the Controversy.

The petition is based upon an assumption of facts not supported by but contrary to the facts at bar and

also contrary to the recital of facts as found in the decision of the District Court of Appeal of the State of California.

The Supreme Court, on petition for certiorari, will not answer questions based upon a state of facts not presented in the case. *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. 124, 83 L. Ed. 81. Rehearing denied in 305 U.S. 675, 83 L. Ed. 437.

The facts in the present case indicate two fundamental observations. First, that the petitioners are alleged to be employees of the County of Los Angeles, and second, that the Board of Supervisors of the County of Los Angeles adopted an order on August 26, 1947, which order is incorporated in the amended complaint.

These facts are set forth in full in the decision of the District Court of Appeal. The petitioners are well aware of the rule under California law that these facts, as stated in the opinion of the District Court of Appeal, are binding upon them because they did not inquire into the correctness of the facts so stated by filing a petition for rehearing before the District Court of Appeal.*

The order of the Board of Supervisors of August 26, 1947, was incorporated by reference in the petitioners' amended complaint in the state court. Allega-

*See footnote, page 6, this brief.

tions contrary to the language of the instrument incorporated by reference are not admitted on general demurrer and are surplusage. *Washer v. Bank of America*, 21 Cal. (2d) 822 at 829; *Pimentel v. The Hall-Baker Co.*, 32 Cal. App. (2d) 697, 701; *Bashford v. A. Levy & J. Zentner Co.*, 123 Cal. App. 204, at 209; *Peak v. Republic Truck Sales Corp.*, 194 Cal. 782 at 790; *Alphonzo E. Bell Corp. v. Bell, etc. Synd.*, 46 Cal. App. (2d) 684.

It is equally well recognized that an allegation of fact contrary to law or impossible in law is not admitted on general demurrer and is surplusage. *Griffin v. County of Colusa*, 44 Cal. App. (2d) 915; *Bookbinders' Trade Ass'n. v. Book Mfrs. Institute*, 7 Fed. Supp. 847, at 848.

It is a fundamental principle that the drastic sanctions of equity may not be invoked without a detailed showing of specific facts justifying such relief. *Davitt v. American Bakers' Union*, 124 Cal. 99; *McKay v. Retail Auto. S. L. Union No. 1067*, 16 Cal. (2d) 311; *City of Alturas v. Gloster*, 16 Cal. (2d) 46.

2. The Decision of the State Court Is Supported by Adequate and Independent State Grounds.

Certiorari should be denied because the decision of the District Court of Appeal of California is supported by adequate and independent grounds based upon California law which involve no issue of Federal constitutional law.

(a) The first independent state ground is the determination that no issue of discharge by the Board of Supervisors or the Loyalty Check Committee can exist in this litigation under the law in California. The District Court of California stated:

> *"From what has so far been said, it is self-evident that neither the Board nor its agents can discharge a civil service employee for any cause that the Civil Service Commission finds insufficient.* Accordingly, if in the view of the Board of Supervisors, or its agents as the appointing power, a civil service employee should be discharged on the sole ground that the employee is 'subversive,' the discharge or attempt to discharge on that ground is of no effect, if, on hearing, the Commission holds otherwise." (Italics ours.) (P. 59)

(b) The second independent state ground is the determination that the issue of discharge is premature.

The California court construing California law determined that the issue of discharge was not before the court in this litigation. In relation to this question, the District Court said:

> "Whether the appointing power will or will not discharge employees as claimed by the plaintiffs for causes of the character enumerated, and whether the Civil Service Commission will uphold

such discharges, if any, on such causes, are not matters upon which this Court may speculate or adjudicate at this time. . . ." (P. 63)

(c) The third independent state ground is the determination that petitioners must first exhaust their administrative remedy by seeking review of the Civil Service Commission in the event that a discharge does occur.

The California Court determined that under California law the conclusive and final right to discharge is vested in the Civil Service Commission of Los Angeles County, and as a corollary, the issue of discharge is not subject to judicial review until petitioners have exhausted their administrative remedy.

The District Court of California stated in its opinion:

> "In case the appointing power wishes to discharge a civil service employee the reasons therefor must be given and, thereupon, if the employee so desires he is entitled to a hearing before the commission. If the commission finds that the reasons are not sufficient, the discharge is void, (fol. 415), despite anything the appointing power can do about it." (P. 58-59)

The rule of exhaustion of administrative remedies is settled in California beyond all question. In the case of *Abelleria v. District Court of Appeal*, 17 Cal. (2d) 280, at page 292 thereof, the Supreme Court of California stated:

"The rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy exhausted before the Courts will act. The authorities to this effect are so numerous that only the important ones need be cited here as illustration. (Authorities) The California cases have consistently applied this settled rule. (Authorities)

"The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by Courts of last resort followed under the doctrine of *stare decisis* and binding upon all Courts. . . We are necessarily led to the conclusion that exhaustion of the administrative remedy is a judicial prerequisite to resort to the Courts."

In California the rule of exhaustion of administrative remedies applies to the review of a discharge of an employee of the County of Los Angeles by the County Civil Service Commission. In the Case of *Jackson v. Howser,* 66 Cal. App. (2d) 870, the District Court of Appeal said:

"It is a jurisdictional prerequisite to an action for judicial relief that the applicant must first invoke and exhaust administrative remedies provided by the provisions of a statute or charter."

The court quoted sec. 34, subdiv. 13 of the Los Angeles County Charter and said:

"There is not any allegation in the petition as amended showing that petitioners complied with the provisions in . . . the Los Angeles County

Charter. Petitioners thereby failed to show a compliance on their part with the provisions of the Los Angeles County Charter and are therefore, under the doctrine of 'exhaustion of administrative remedies,' precluded from having a writ of mandate issue in the present action."

The United States Supreme Court recognizes the rule that one must exhaust his administrative remedies prior to resorting to the courts for judicial determination of his rights. *Myers v. Bethlehem Shipbldg. Corp.*, 303 U.S. 41, 82 L. Ed. 638.

3. The Supreme Court Will Avoid the Unnecessary Decision of Constitutional Questions.

(a) It is well established that until such time as petitioners exhaust the administrative remedies available to them under California law a determination by this court on constitutional questions is unnecessary and premature.*

(b) The petition for certiorari should be denied because the complaint for declaratory relief is an improper remedy to test the validity of a state statute for vagueness and uncertainty in the absence of prior construction by a state court. Until such meaning is determined by the state court, a determination by this court unnecessarily determines a constitutional question.

*This brief, pages 17-19.

Petitioners urge that the program of respondents is void because of alleged wholly arbitrary and ill-confined standards. (Petition, page 16.)

In the case of *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 89 L. Ed. 1725, at page 1739, this Court said:

> "(T)he objection that sections 7 and 16 of the state statute are too vague and uncertain to meet constitutional requirements is one which cannot appropriately be considered in a declaratory judgment proceeding in the federal courts in advance of their authoritative construction by a state court. As we have said, it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions. (citing cases). But the use of the declaratory judgment procedure to test the validity of a state statute for vagueness and uncertainty invites rather than avoids the unnecessary decision of the constitutional question."

The reasoning of the court is predicated upon the fact that the state court when given an opportunity may so construe the state statue as to avoid any claim of unconstitutionality.

4. The Construction Given by the Highest State Court to a Statute of That State Is Conclusive Upon the Supreme Court of the United States Where the Question Involved Is Whether Such Statute Is Repugnant to the Federal Constitution.

If the construction by the District Court of Appeal of the State of California renders the order of the Board of Supervisors of August 26, 1947, constitutional and valid legislation, the Supreme Court of the United States will not disregard this construction and arrive at a different construction which will make the Board order repugnant to the Federal Constitution. *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed. 192.

The rule is established that in passing on the constitutionality of a state statute, the Supreme Court of the United States will follow the decisions of the state court of last resort as to the purpose and scope of a statute and will only determine whether such statute as so construed is in conflict with the Federal Constitution. *Fallbrook Irrig. Dist. v. Bradley*, 164 U.S. 112, 41 L. Ed. 369; 11 Am. Jur. 745.

The statute is to be read with the construction placed upon it by the state court. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 73, 55, L. Ed. 369, 375; *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 18, 76 L. Ed. 126, 143; *Huddleston v. Dwyer*, 322 U.S. 232, 236, 88 L. Ed. 1246, 1249; *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 236, 85 L. Ed. 139, 143.

5. The Petition for Certiorari Presents No Case or Controversy Cognizable in the Supreme Court of the United States.

(a) As construed by the District Court of Appeal of California, the Board of Supervisors' order of August 26, 1947, presents no case or controversy.

Under the decision of the District Court of Appeal, interpreting the state law, there is eliminated from consideration the alleged issue of discharge. The state law is also interpreted to indicate that the members of the Loyalty Check Committee have no legal power to discharge petitioners. Therefore, the sole controversy before this court is predicated upon the allegations of

1. The status of petitioners as employees, and

2. The bare existence of the Board order of August 26, 1947.

It is established by numerous decisions of this Court that the bare existence of a statute which might affect an individual in the absence of any actual, as distinguished from potential, act to apply or enforce the statute, presents no justiciable case or controversy. This principle is clearly defined and supported by the decision in the case of *United Public Workers v. Mitchell*, 330 U.S. 75, 91 L. Ed. 754. Therein this court stated at page 767:

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of

Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. . . . It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other. . . .

"Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations."

The actual facts in the instant case and the case of *United Public Workers v. Mitchell, supra,* are substantially identical.

Both cases involve actions for injunction and declaratory relief.

Both cases involve the existence of regulations limiting the conduct and prescribing duties of public employees.

Both cases concern petitioners belonging to a class embraced within the rule of conduct.

The statute in the *United Public Workers v. Mitchell* case, *supra,* and the Board of Supervisors' order in the case at bar involve no threats to petitioners other than those implied by the petitioners from the existence of the regulations.

The case at bar contains two factual differences which render the instant controversy more nebulous and ill-defined than *United Public Workers v. Mitchell, supra.*

First, in the *United Public Workers* case, *supra,* the petitioners were advised by the terms of the Hatch Act that violation would result in dismissal from the service; whereas, in the instant case as construed by the State Court of California, the issue of discharge is not presented, and even assuming that it is presented, the respondent members of the Loyalty Check Committee do not have power to discharge.

Second, in the *United Public Workers* case, *supra,* this court was advised of the proposed action of the petitioners and the manner in which the Hatch Act purportedly would concretely and adversely affect them. In the instant case the proposed action of petitioners in relation to the Board order of August 26, 1947, is unknown to this court. They do not state that they will refuse to execute the oath and affidavit; or assuming that they will, in what manner their answers will be antagonistic to the program of respondents. As

a result, this Court is unable, upon the record presented, to even advise petitioners unless it assumes a series of hypothetical situations which might apply to all of the individual petitioners.

The declarations of this Court embraced in the *United Public Workers* case, *supra*, constitute no new position of the Court but are a reaffirmation of principles long established. These principles apply with equal force to actions for injunction and those for declaratory relief.

In the case of *Massachusetts v. Mellon*, 262 U. S. 447, 67 L. Ed. 1078, at page 1084, the Court adopted a quotation from *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, to the following effect:

> "This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here."

In *New Jersey v. Sargent*, 269 U. S. 328, 70 L. Ed. 289, at page 294, the Court states:

> "While the state is thus apparently put in the position of objecting to the licensing of projects sanctioned by its own laws, the bill explains that the objection is chiefly to the restrictions and conditions to which, according to the terms of the act, an applicant is deemed to assent by seeking and accepting a license. These restrictions and conditions are assailed in the bill as passing beyond the

field of congressional power and invading that reserved to the state. But whether they are thus invalid cannot be made the subject of judicial inquiry *until they are given or are about to be given some practical application and effect.*" (Italics ours.)

In the case of *United States v. West Virginia*, 295 U. S. 463, 79 L. Ed. 1546, at 1552, the Supreme Court stated:

" . . . Until the right asserted is threatened with invasion by acts of the State, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court."

The Court further stated in the case of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688, at 698:

" . . . The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions.

" . . . *Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention.*" (Italics ours.)

In the case of *Watson v. Buck*, 313 U. S. 387, 85 L. Ed. 1416, at page 1423:

"A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity."

The principle is very graphically illustrated in the case of *Helco Products Co. v. McNutt,* U. S. Court of Appeals for the District of Columbia, 137 Fed. (2d) 681, wherein the Court of Appeals declared:

" . . . Appellant concedes that the Agnew case, and others, speak in terms of an official threat of enforcement, as a requisite of justiciability in declaratory judgment actions. But appellant would distinguish the present case on the theory that: 'In the case at bar the Administrator has the authority and as a matter of law has officially threatened to prosecute the appellant or to seize and libel its merchandise.'

" . . . It does not appear just how far appellant would carry its argument concerning the threat of prosecution which, it says, is implicit in the statute by reason of its civil and criminal sanctions. Here again the argument reduces itself very quickly, to an absurdity. Certainly such sanctions are convincingly present in laws prescribing homicide and robbery. But, presumably, it would not be seriously contended that one who contemplated killing another, or taking his property, could establish his right to a declaratory judgment, upon a hypothetical case of murder or robbery, *by requesting in advance the advice of a grand jury or the attorney general. The fact that one wants or needs legal advice is not sufficient.*

" . . . Here, no order was issued, no steps were

taken to put any administrative program into action; appellant was far removed from penalties of any kind. This was not enough.

"No doubt, a persuasive argument can be made for extending the use of advisory opinions to all situations in which conflicts may impend, between private business and government agencies, in the working out of policies and programs. Much of the uncertainty of business management could, perhaps, thus be eliminated. *What a comfort it would be, if a declaratory judgment could be made as available as an interoffice memorandum, whenever a board of directors meets to consider a proposed new venture. But that millenium has not yet arrived.*" (Italics ours.)

(b) Petitioners' amended complaints do not contain facts essential to state a case or controversy.

Twenty-five petitioners are now petitioning this court to declare their rights as said rights existed upon the date petitioners' complaints were filed, which was seven days after the Board of Supervisors' order of August 26, 1947. (P. 25, S. 23.) The complaint proceeds upon a series of imaginary situations which must be assumed by the court. After so assuming the existence of such situations, then none of the situations may be applicable to any of the petitioners.

Petitioners or any of them do not state that they have or even will refuse to execute the Oath and Affidavit.

Petitioners or any of them do not state whether or not they have or intend to sign the Oath and Affidavit and whether in this connection they have or intend to execute only part of the Oath and Affidavit.

Petitioners or any of them do not disclose if they have ever been or now are members of any organization which advocates the overthrow of the government by force and violence.

Petitioners or any of them do not disclose if they advocate the overthrow of government by force and violence.

Petitioners or any of them do not disclose if they have ever been or now are members of any or all of the organizations listed in Paragraph "D" of the Oath and Affidavit.

Petitioners or any of them do not disclose for what reason, if any, they will be discharged, if it be presumed that a discharge will occur.

Petitioners or any of them do not disclose for what reason, if any they will be reported to the Board of Supervisors as subversive and disloyal.

Petitioners or any of them do not disclose for what reason if any they will suffer irreparable injury because of the alleged acts of the respondents.

In addition to these material omissions this Court is further asked to assume that the respondents have taken certain action equally essential to the establishment of a judicial case or controversy.

This Court must assume that pursuant to the Board order of August 26, 1947, and before September 3, 1947, the respondents printed and circulated 22,000 oaths and affidavits and did present them for signature to the same 22,000 employees.

This Court is further asked to assume that within the same seven days, but without any facts in support thereof, that the respondents, and particularly the Loyalty Check Committee had a meeting, were advised that some of the petitioners had not signed, and then as a matter of fact did threaten each or some of the petitioners with dismissal.

This Court is asked to assume that within the same seven days, but without any facts in support thereof, that the respondents, and particularly the Loyalty Check Committee, had a meeting, were advised that some or all of the petitioners had indicated membership in organizations which advocated the overthrow of constitutional government by force and violence in Paragraph "B" and marked organizations listed in Paragraph "D", and as a matter of fact, did threaten each or all of petitioners with dismissal.

This Court is asked to assume that within the same seven days, but without any facts in support thereof, that the Auditor prepared in triplicate, an alphabetical list of 22,000 employees, transmitted these lists to the Registrar of Voters and to the Federal Bureau of Investigation, and that still within the same seven

days, the Registrar of Voters and the Federal Bureau of Investigation returned the same to the Loyalty Check Committee, who thereafter held a meeting, digested all of the reports and then decided, in conjunction with the answers disclosed in the oath and affidavit, that some of the petitioners should be reported to the Board of Supervisors, and further and independently of the report to the Board of Supervisors, did threaten each and all of the petitioners with discharge.

This Court is entitled to objective proof in the form of specific and concrete allegations of fact that an actual case or controversy exists. This Court should not be compelled to determine a constitutional issue upon the purely subjective claim of petitioners that they have been "threatened." To contend otherwise is to deprive this court of its power to determine its jurisdiction and grant to petitioners and all other claimants the prerogative to create controversies where in fact none exist.

6. Particular Reference to Steiner v. County of Los Angeles No. 712.

The amended complaint alleges that Steiner is a County employee. (S. 1.)

The amended complaint alleges that the order of the Board of Supervisors specifically relates to County employees. (S. 4.)

Steiner is not a County employee. Steiner resigned November 3, 1948. (Please see Exhibit "A" attached hereto.)

One of the elementary doctrines of constitutional law, firmly established by the authorities, is that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby. Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights. Assailants must therefore show the applicability of the statute and that they are thereby injuriously affected.

The rule that interested parties alone can question the constitutionality of statutes applies likewise to ordinances. *Buchanan v. Warley,* 245 U. S. 60, 62 L. Ed. 149; *11 Am. Jur.* 748-749.

The corollary to the general rule is that one who is not prejudiced by an enforcement of the act of the legislature cannot question its constitutionality. As Steiner is not a member of the class affected, she may not now seek certiorari. Furthermore, she must, in order to maintain certiorari, show that she is a member of the class and will be prejudiced by the statute in question. *First National Bank v. Louisiana Tax Comm.,* 289 U. S. 60, 77 L. Ed. 1030; *Interstate Busses Corp. v. Holyoke Street R. Co.,* 273 U. S. 45, 71 L. Ed. 530; *Middleton v. Texas Power & L. Co.,* 249 U. S. 152, 63 L. Ed. 527; *11 Am. Jur.* 759.

IV.

THE ISSUES ACTUALLY BEFORE THIS COURT UNDER THE PETITION FOR CERTIORARI PRESENT NO DEBATABLE CONSTITUTIONAL QUESTION.

a. Petitioners come before this court not as private citizens but as employees of the people of the County of Los Angeles and the State of California. Therefore petitioners seek redress against their government not under constitutional guarantees extended to them as private citizens; petitioners are in reality before this court asking for an interpretation of their *rights as framed by a contract* between the petitioners and the citizens of the County of Los Angeles and the State of California. (P. 2; S. 2.)

b. The petitioners have accepted the conditions of their contract. Petitioners impliedly covenant that they will not destroy their employer; that they will be loyal to the form of government lawfully chosen by the people; that they will faithfully perform their duties and that they will work no injury to the government that they are employed to represent. *Brown et al. v. Dupuy,* 4 Fed. (2d) 367; *Miller v. Jones,* 159 N. W. 671; *Osburn v. DeForce,* 257 Pac. 685; *Puritas Laundry Co. v. Green,* 15 Cal. App. 654; *Pawell v. Unemployment Compensation Board of Review,* 22 Atl. (2d) 43; *Hornung v. State,* 19 N. E. 151; *Friedman v. Schwellenbach et al.,* 159 Fed. (2d) 22; *U. S. v. Curtis,* (1882), C. C. N. Y. 12 Fed. 824; *35 Am. Jur.* 514; *39 Corpus Juris* 82; *21 Cal. Jur.* 892.

c. The advocacy of overthrow of constitutional government by force or violence by an employee of the government is an incompatible act on behalf of the employee. *U. S. v. Curtis*, C. C. N. Y., 12 Fed. 824.

d. The advocacy of the forceful overthrow of constitutional government by an employee thereof constitutes a breach of the contractural relationship by the employee. *U. S. v. Bryan*, 72 Fed. Supp. [illegible]; *Congress of Ind. Organizations v. City of Dallas*, 198 S. W. (2d) 143; *Communist Party v. Peek*, 20 Cal. (2d) 586; *Perez v. Board of Police Commissioners*, 78 Cal. App. (2d) 638.

e. The government has the obligation to determine whether its employees are violating the obligation of their contract or performing acts incompatible to the relationship. *United Public Workers v. Mitchell*, 330 U. S. 75, 91 L. Ed. 754; *United States v. Marzani*, 71 Fed. Supp. 615; *Barsky v. United States*, 167 Fed. (2d) 241; *Hayman v. City of Los Angeles*, 17 Cal. App. (2d) 674; *Communist Party v. Peek*, 20 Cal. (2d) 536; *Danskin v. San Diego Unified School Dist.*, 28 Cal. (2d) 536; *Perez v. Board of Police Commissioners*, 78 Cal. App. (2d) 638.

f. Government employees have the duty to respond to an oath and affidavit giving evidence as to whether they are breaching the contractural relationship or committing incompatible acts. *Hamilton v. University of California*, 293 U. S. 245, 79 L. Ed. 343; *Barsky v. United States*, 167 Fed. (2d) 241; *McAuliffe*

v. Mayor, etc. of New Bedford, 29 N. E. 517; *Christal v. Police Comm.*, 33 Cal. App. (2d) 564; *Hayman v. City of Los Angeles*, 17 Cal. App. (2d) 674.

g. Government has the right, in the exercise of its police power, to prescribe the qualifications of its employees and to attach reasonable conditions to their employment. *United Public Workers v. Mitchell*, 330 U. S. 75, 91 L. Ed. 754; *Hamilton v. University of California*, 293 U. S. 245, 79 L. Ed. 343; *Friedman v. Schwellenbach et al.*, 159 Fed. (2d) 22; *State v. Kirby*, 163 S. W. (2d) 990; *Ricks v. Dept. of State Civil Service*, 200 La. 341, 8 So. (2d) 49.

CONCLUSION

The joint petition for certiorari should be denied.

1. The petition is predicated upon basic errors.
   a. Petition is predicated on erroneous facts.
   b. Petition raises false questions.
   c. Petition contains false reasons for hearing.

2. Certiorari will not lie to review a constitutional question predicated upon imaginary facts not presented in the controversy.

3. The decision of the state court is supported by adequate and independent state grounds.

4. Certiorari will not lie to review the unnecessary decision of constitutional questions.

5. A petition for certiorari for the purpose of contesting the validity of a state statute under constitutional objections opens only for review the statute as construed by the state court.

6. The joint petition for certiorari presents no case or controversy.

7. Steiner is not an interested party.

8. The petition presents no debatable constitutional questions because the rights of the petitioners stem from a controversy involving the terms of their contract and not constitutional guarantees running to private citizens.

a. The advocacy of the forceful overthrow of constitutional government by an employee thereof constitutes both a breach of the contractural relationship and an incompatible act.

b. The government has the obligation to determine whether its employees are violating the obligation of their contract or performing incompatible acts.

c. Government employees have the duty to respond to an oath and affidavit giving evidence as to whether they are breaching the contractural relationship or committing incompatible acts.

9. Government has the right, in the exercise of its police power, to prescribe the qualifications of its employees and attach reasonable conditions to their employment.

WHEREFORE, respondents pray that the joint petition for writs of certiorari to the District Court of Appeal of the State of California, Second Appellate District, be denied.

Respectfully submitted,

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